IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MARTIN O. VASQUEZ, Petitioner Employee, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, TUCSON CARPENTRY, INC., Respondent Employer, STATE COMPENSATION FUND OF ARIZONA, Respondent Insurer.	2 CA-IC 2006-0020 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

SPECIAL ACTION - INDUSTRIAL COMMISSION

ICA Claim No. 20050-800612

Insurer No. 05-01957

Gary M. Israel, Administrative Law Judge

AWARD AFFIRMED

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P E L A N D E R, Chief Judge.

¶1 In this statutory special action, petitioner/employee Martin Vasquez challenges the decision of the administrative law judge (ALJ) that awarded workers' compensation benefits for a limited time and denied his claims for continuing, supportive care or permanent compensation benefits. Vasquez raises several issues, none of which merits setting aside the award. Accordingly, we affirm.

BACKGROUND

¶2 We view the evidence in the light most favorable to sustaining the ALJ's findings and award. *Rent A Center v. Indus. Comm'n*, 191 Ariz. 406, ¶ 1, 956 P.2d 533, 534 (App. 1998). Vasquez, who had been employed by Tucson Carpentry, Inc. as a carpenter, was initially injured on December 7, 2004, when he "felt something in [his] back" while "lifting [a] wall to set it up." He was treated by Dr. Smith, a chiropractor, who diagnosed a "lumbosacral sprain/strain and a disk displacement." Following that accident, Vasquez did not return to work until early January 2005.

¶3 A few days later, on January 7, 2005, Vasquez was working on the roof of a single story residence when "a rafter broke" and he fell between "nine to eleven" feet to the ground, landing on his feet and then falling forward. Based on that incident, Vasquez filed a workers' compensation claim on March 14, 2005. The insurer accepted the claim and thereafter closed it by notice issued October 10, 2005, with no permanent impairment.[1] Vasquez protested the closure of his claim and requested a hearing.

¶4 At the hearing, Smith testified he had periodically treated Vasquez after the accident for "low back pain," "neck pain, shoulder pain, . . . tingling in both arms, and [increased] radiating leg pain down the left leg." According to Smith, Vasquez had "reached maxim[um] medical improvement" by September 7, 2005, and Smith released him "to return on an as-needed basis." Smith also testified that Vasquez had returned for "supportive care" several times after September 2005, and that his last visit had been in April 2006. When asked whether he believed Vasquez had suffered "a permanent impairment," Smith opined that Vasquez "deserve[d] at least a five percent impairment rating, with some supportive care in the future" and that "he shouldn't do construction work."

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[1]In their answering brief, the respondents employer and insurer state that their October 10, 2005 notice "closed the claim effective August 1, 2005 with no permanent impairment and no supportive care," apparently based on the statement in the notice that "Actual Discharge Date is 8/1/05." But the ALJ stated that the insurer had closed the claim "effective October 10, 2005," and respondents did not expressly challenge that statement below or here. In addition, the Workers' Compensation Rules of Practice and Procedure apparently would not have permitted the insurer to retroactively terminate benefits more than thirty days before its notice was issued. *See* n.2, *infra*.

¶5 Dr. Grimes, a board-certified orthopedic surgeon who examined Vasquez at the insurer's request in June 2005 and again in April 2006, also testified. According to Grimes, Vasquez had been "stationary as of [his July 28, 2005] MRI study." Grimes further testified that he had "rate[d]" Vasquez's injury "pursuant to the Fifth Edition of the [American Medical Association (AMA)] Guidelines" and had "not f[ou]nd a basis for impairment." He opined that Vasquez could return "to his date of injury employment."

¶6 The ALJ adopted "the testimony, opinions and reports of Dr. Grimes as being most probably correct and well-founded" and awarded Vasquez "temporary compensation" and "medical . . . benefits" "from January 7, 2005, through July 31, 2005." The ALJ found that Vasquez was not entitled to any supportive care or permanent compensation benefits. The ALJ affirmed his findings on administrative review, and this special action followed.

DISCUSSION

I. Medical testimony and compensation termination date

¶7 Vasquez primarily argues the ALJ "improper[ly]" relied "on the testimony of [Dr. Grimes]." Instead, Vasquez argues, the ALJ should have relied on Smith's opinion because he was the treating chiropractor who was more aware of Vasquez's symptoms and pain. As noted above, the ALJ adopted Grimes's opinions, including those set forth in his addendum report dated July 31, 2005. In that report, Grimes reviewed the report of Vasquez's magnetic resonance imaging (MRI) scan performed on July 28 and determined from that "negative MRI and the essentially normal clinical findings" that Vasquez was

"stable and stationary" at that point in time and "d[id] not have impairment as a result of the work injury of January 7, 2005."

¶8 An ALJ resolves any conflicts in the evidence, and if the award is based on any reasonable theory of the evidence, we will not disturb it. *Kaibab Indus. v. Indus. Comm'n*, 196 Ariz. 601, ¶ 25, 2 P.3d 691, 699 (App. 2000). In cases such as this,

> [w]here the result of an accident is not one which is clearly apparent to a layman, such as the loss of a limb or external lesion, the physical condition of an injured employee after an accident and the causal relation of the accident to such condition usually can only be determined by expert medical testimony.

Waller v. Indus. Comm'n, 99 Ariz. 15, 20, 406 P.2d 197, 200 (1965). The medical condition and any impairment must be established to a reasonable degree of medical probability. *Payne v. Indus. Comm'n*, 136 Ariz. 105, 108, 664 P.2d 649, 652 (1983). The ALJ, not this court, resolves conflicts in the experts' testimony, and we will not disturb the resolution "unless it is wholly unreasonable." *Ortega v. Indus. Comm'n*, 121 Ariz. 554, 557, 592 P.2d 388, 391 (App. 1979). We have no basis for disturbing the ALJ's resolution of the conflicting medical opinions here.

¶9 In support of his argument that the ALJ erred in not adopting Smith's opinions, Vasquez cites *Rutledge v. Industrial Commission*, 108 Ariz. 61, 492 P.2d 1168 (1972), for the proposition that "the opinion of a doctor who did not examine the injured employee should not be preferred over a doctor that does examine the injured worker and has been treating the injured worker." The court in *Rutledge* concluded "that . . . testimony . . . based

solely upon a review of the Commission file, does not constitute substantial evidence to support the Commission's award, especially when considered with the testimony of the examining physician." *Id*. at 65, 492 P.2d at 1172. But here, Grimes personally examined Vasquez twice, in June 2005 and April 2006, and also reviewed Vasquez's MRI reports. *Rutledge* is inapplicable here, inasmuch as Grimes's opinion was based on his own examinations and first-hand knowledge.

¶10 Vasquez also claims Grimes's testimony was "inconsistent" and unreliable because he stated in his June 2005 report that Vasquez was "not yet stable and stationary" and "should have the benefit of an MRI study," but then, without seeing Vasquez again before the July 31, 2005 report, indicated Vasquez no longer had an impairment. But the opinion in Grimes's July 2005 report was based on his review of "the report of the MRI of [Vasquez's] lumbar spine done on July 28, 2005" and, therefore, was supported by medical evidence. Accordingly, the ALJ had a reasonable basis for adopting Grimes's opinion, and we have no basis to disturb the ALJ's findings. *See Carousel Snack Bar v. Indus. Comm'n*, 156 Ariz. 43, 46, 749 P.2d 1364, 1367 (1988).

¶11 In a related argument, Vasquez claims it was "improper" for the ALJ to "retroactively" terminate his benefits. In its October 10, 2005 notice, the insurer closed the claim effective that date, *see* n.1, *supra*, finding no permanent impairment and awarding no supportive care. The ALJ, however, awarded compensation from the date of injury only through July 31, 2005—the date Dr. Grimes found Vasquez had become medically

stationary. Without citing any authority, Vasquez argues "[t]he ALJ may have the power to retroactively terminate the benefits to a year before [the notice of claim status], but the prejudice to the injured worker should have to be considered."[2] He further argues the ALJ's "decision to find [him] stationary in July, 2005 is extremely prejudicial . . . and is not based upon credible evidence." At most, Vasquez contends, "[t]he stationary date of April 17, 2006 [when Grimes last saw him] is the date supported by the credible evidence."

¶12 As noted above, however, the ALJ's decision was based on credible evidence from Grimes that Vasquez was stable and stationary as of July 31, 2005.[3] Further, because the ALJ accepted Grimes's opinion that Vasquez was stable and stationary as of that date, Vasquez cannot demonstrate that he was prejudiced by not having received compensation during a time that he was medically stationary and able to return to work. Again, we cannot say the ALJ's resolution was "wholly unreasonable." *See Ortega*, 121 Ariz. at 557, 592 P.2d at 391.

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[2]We note that under the Workers' Compensation Rules of Practice and Procedure, a self-insured employer or insurer's notice terminating or changing benefits "shall not have a retroactive effect for more than 30 days from the date a carrier or self-insured employer issues the subsequent notice of claim status." Ariz. Admin. Code R20-5-118 (A). That rule, however, provides: "[t]he Commission may for good cause relieve a carrier or self-insured employer of the effect of this subsection." *Id.* Thus, that rule apparently does not restrict an ALJ's ability to back-date a termination of benefits, nor does Vasquez so argue.

[3]Vasquez repeatedly asserts Grimes did not release him "to unrestricted activity . . . until April, 2006" and thus the effective termination date should not have been before that date. Yet, as noted above, in his report of July 31, 2005, Grimes found that Vasquez's condition was "stable and stationary." Thus, we disagree with Vasquez's assertion that "[t]here has been no showing that treatment was not reasonable and necessary during the period between July, 2005 and April, 2006."

¶13 Finally, we agree with Vasquez's argument that "the Worker's Compensation Act should be liberally interpreted in favor of the injured workman." *See Self v. Indus. Comm'n*, 192 Ariz. 399, ¶ 6, 966 P.2d 1003, 1005 (App. 1998). But the ALJ did not construe the statutes against Vasquez. Rather, the ALJ, based on his permissible resolution of conflicting medical evidence, awarded certain workers' compensation benefits to Vasquez but simply limited them to that which a medical professional, whose opinions the ALJ adopted, deemed necessary.

II. Supportive care

¶14 Vasquez next argues the ALJ should have awarded "supportive care." Citing *Capuano v. Industrial Commission*, 150 Ariz. 224, 722 P.2d 392 (App. 1986), Vasquez contends that "cases indicate[] that even without a disability[,] supportive care can be found." But the court in *Capuano* merely stated that, although "[t]he Arizona Workers' Compensation Act does not specifically authorize awards of supportive medical benefits," "the propriety of granting such benefits has been recognized where a continuing need for such care is causally related to the industrial injury." *Id*. at 226, 722 P.2d at 394. Thus, to justify an award of supportive care, a claimant must demonstrate a continuing need for such care.

¶15 Vasquez apparently contends that, because Smith testified to a need for supportive care and Grimes did not directly address the issue, supportive care should have been awarded. But, contrary to Vasquez's contention that "there was no testimony at the

hearing that supportive care was not needed," Grimes did testify that he "didn't see the need" for "periodic chiropractic treatments." Further, in his April 10, 2006 report, Grimes specifically stated: "I do not find the need for supportive care." In view of this evidence and the ALJ's acceptance of it, we find no error.

III. AMA guidelines

¶16 Vasquez further argues the ALJ erred in "reject[ing]" Smith's testimony that "the AMA guides did not apply."[4] As Vasquez correctly notes, the AMA guidelines "do not provide the exclusive means for rating permanent impairment due to residual pain." *See Simpson v. Indus. Comm'n*, 189 Ariz. 340, 344, 942 P.2d 1172, 1176 (App. 1997) ("When the *Guides* do not cover, or do not permit accurate assessment of[] a claimant's impairment, that does not mean that the impairment is not compensable. It means rather that the impairment may be established by other means."); *see also Benafield v. Indus. Comm'n*, 193 Ariz. 531, ¶ 20, 975 P.2d 121, 127-28 (App. 1998). Our courts have so concluded because debilitating pain—which cannot always be assessed under the AMA guidelines—can amount to a permanent injury. *See Simpson*, 189 Ariz. at 345, 942 P.2d at 1177 ("'pain is compensable as a[] [permanent] impairment only when it is disabling'"), *quoting Cassey v. Indus. Comm'n*, 152 Ariz. 280, 283, 731 P.2d 645, 648 (App. 1987).

[4]We note that Dr. Smith did not equivocally state that the AMA guides did not apply. Rather, he testified that he was not "familiar with the AMA Guidelines," but would "disagree" with the guidelines if they say "a normal MRI" precludes a finding of disability. To the extent that testimony equates to an opinion that the guidelines should not have applied in this case, we address the issue.

¶17 Based on those principles, Vasquez claims the ALJ "misinterpreted the law and . . . failed to follow the cases that indicate that if the doctor does not feel that the AMA Guides apply, that the doctor can give his opinion of permanent disability." But, although the ALJ accepted as more credible Grimes's testimony based on the AMA guidelines, the ALJ did not preclude Smith from opining that Vasquez "deserve[d] at least a five percent impairment rating, with some supportive care in the future," despite Smith's unfamiliarity with the AMA guidelines.

¶18 Thus, the ALJ did allow testimony outside of the AMA guidelines. But even with Smith's testimony, in view of the ALJ's acceptance of Grimes's opinions, Vasquez did not demonstrate "'that the pain [wa]s caused by his industrial injury and result[ed] in his permanent inability to return to his former work,'" as is required when the AMA guides do not apply. *Simpson*, 189 Ariz. at 345, 942 P.2d at 1177, *quoting Cassey*, 152 Ariz. at 283, 731 P.2d at 648. Again, we will not disturb the ALJ's resolution of conflicting medical testimony "unless it is wholly unreasonable." *Ortega*, 121 Ariz. at 557, 592 P.2d at 391. Because Grimes based his opinion on two personal evaluations of Vasquez and his review of two MRI's, we cannot say the ALJ was "wholly unreasonable" in accepting Grimes's opinion.

IV. Testimony by Vasquez

¶19 Without citing any authority or pertinent portions of the record, Vasquez lastly argues "[t]he ALJ improperly did not determine [Vasquez's] credibility . . . or consider [his]

testimony in deciding this case" and, therefore, "[t]he ALJ should be reversed." We first note that Vasquez has failed to adequately support or develop this argument. *See* Ariz. R. P. Spec. Actions 7(e), 17B A.R.S. Further, nothing in the record suggests the ALJ failed to consider Vasquez's testimony. Rather, the ALJ's decision thoroughly details that testimony. For all these reasons, we reject this final argument.

DISPOSITION

¶20 The ALJ's award is affirmed.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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GARYE L. VÁSQUEZ, Judge